Supreme Court, U. S.
FILED
JAN 16 1981
MICHAEL RODAK, JR., CLERK

No. 80-1197

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ROY DALTON GARNER,

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON MARKS
9911 West Pico Boulevard, Suite 1000
Los Angeles, California 90035
Telephone - (213) 553-0142

Attorney for Petitioner

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

QUESTION PRESENTED

Whether Title 28 U.S.C. § 1291 confers jurisdiction on an appellate court to hear a pretrial appeal brought from an order of a trial court denying (without hearing) a motion to dismiss an indictment for jurisdictional defects in the grand jury proceedings.

No. .....

SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ROY DALTON GARNER,[1]

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[1]The indictment returned by the Grand Jury for the District of Nevada charged Roy Garner, Sherman Dennis and Rowena Garner with the crimes of wire fraud (18 U.S.C. § 1343) and interstaet travel in furtherance of an unlawful activity (18 U.S.C. §§ 1952 and 2314). Petitioner's pretrial appeal was taken from orders of the trial court as hereinafter specified, and he was severed from the remaining defendants. Rowena Garner also filed a pretrial appeal and, after her trial and conviction, filed a direct appeal. Originally, the pretrial appeals of Roy and Rowena Garner were consolidated for argument, but on July 30, 1980, the Court of Appeals issued an order consolidating Rowena's pretrial appeal with her direct appeal. As of January 1, 1981, neither of Rowena's appeals have been scheduled for oral argument in the Court of Appeals. (See n. 2, infra, and Appendix "D" at appendix p. 22.) Sherman Dennis was given immunity and testified for the government.

TABLE OF CONTENTS

	Page
Question Presented	i
Caption of the Case (indicating all parties interested in the outcome of the proceedings - S. Ct. Rule 21.1(b))	ii
Table of Contents	iii
Table of Authorities Cited	iv
Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit	1
Petitioner prays for writ of certiorari	1
Opinions Below	2
Grounds for Jurisdiction	2
Applicable Constitutional Provisions and Statutes	3
Statement of the Case	3
Argument	6
Conclusion	7
Index to Appendixes	
Appendix "A" through "D"	

TABLE OF AUTHORITIES CITED

Cases	Page
Abney v. United States, 431 U.S. 651 (1977)	6, 7
Dombrowski v. Eastland, 387 U.S. 82 (1967)	7
Helstoski v. Meanor, 442 U.S. 500 (1979)	6, 7
Petite v. United States, 361 U.S. 529 (1960)	2, 4
United States v. Alter, 482 F.2d 1016 (1971)	5
United States Constitution	
Amendment V	3, 7
United States Statutes	
18 U.S.C. 1343	i, 3
18 U.S.C. 1952	i, 3
18 U.S.C. 2314	i, 3
28 U.S.C. 1254(1)	3
28 U.S.C. 1291	2, 3, 4, 5, 6
Federal Rules of Criminal Procedure	
Rule 6(c)	5

No. .....

SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ROY DALTON GARNER,

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a petition of ROY DALTON GARNER for a Writ of Certiorari to review the order made by the United States Court of Appeals for the Ninth Circuit on October 6, 1980, dismissing a portion of petitioner's pretrial appeal; and to review the order of the appellate court entered November 19, 1980, denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

OPINIONS BELOW

The opinion of the Court of Appeals filed October 6, 1980 (*United States v. Garner,* USCA No. 79-1802) has not yet been reported. A copy of that opinion is provided herewith in the appendix to this petition (Appendix "A" - appendix pp. 1 - 19), as is a copy of the order of November 19, 1980, denying the Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix "B" - appendix p. 20).

GROUNDS FOR JURISDICTION

1. On October 6, 1980 the Court of Appeals for the Ninth Circuit, in *United States v. Roy Dalton Garner* (No. 79-1802), affirmed the order of the trial court denying petitioner's motion to dismiss the indictment on the ground of double jeopardy. Additionally, the court dismissed that portion of the appeal taken from the trial court's order denying the motion to dismiss the indictment for violation of the so-called "*Petite* Policy" (*Petite v. United States* (1960), 361 U.S. 529), and also dismissed the portion of the appeal taken from the order of the trial court denying the motion to dismiss the indictment for jurisdictional irregularities in the grand jury proceedings, on the ground, *inter alia,* that these latter two orders of the trial court were not "final decisions" under 28 U.S.C. § 1291 and that "these claims may be asserted if the appellant is subsequently convicted." (Appendix "A".)

2. On November 19, 1980, a Petition for Rehearing and Suggestion for Rehearing En Banc was ordered denied (Appendix "B").

3. On December 17, 1980, the mandate was ordered

stayed until January 19, 1981, for the purpose of allowing petitioner to bring this petition (Appendix "C" - appendix p. 21).

4. Jurisdiction is conferred on this Court by virtue of 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V (in part):

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ... "

28 U.S.C. § 1291:

> "The Courts of Appeals shall have jurisdiction from all final decisions of the District Courts of the United States."

STATEMENT OF THE CASE

1. On April 26, 1979, a seven-count indictment was returned by the United States Grand Jury for the District of Nevada, charging ROY GARNER, Sherman Dennis and Rowena Garner with the crimes of wire fraud in violation of 18 U.S.C. § 1343 and interstate travel in furtherance of an unlawful activity in violation of 18 U.S.C. §§ 1952 and 2314.

2. On July 20, 1979, ROY GARNER moved to

dismiss the indictment on the ground, *inter alia,* that the prosecution violated the *Petite* policy. That motion was denied by the District Court on August 9, 1979.

3. On August 9, 1979, ROY GARNER moved to dismiss the indictment on the ground that he had been formerly in jeopardy for the offense of wire fraud as alleged in the indictment. That motion was denied by the District Court.

4. On November 6, 1979, ROY GARNER moved to dismiss the indictment for grand jury irregularities. That motion was denied, without hearing, by the District Court.

5. Petitioner's pretrial appeal was taken from the orders of the trial court above described, and he was severed from the remaining defendants. The defendant Rowena Garner proceeded to trial and was convicted.[2] The third defendant, Sherman Dennis, was given immunity and testified for the government at Rowena's trial.

6. On appeal, the denial of the double jeopardy claim was affirmed. The "grand jury irregularities" and the "*Petite* policy" appeals were dismissed on the ground that these trial court orders were not "final decisions" and the appellate court was without jurisdiction under 28 U.S.C.

---

[2]With the exception of the "Double Jeopardy" motion, co-defendant Rowena Garner made identical pretrial motions as brought by petitioner and described herein. She also filed a pretrial Notice of Appeal, but the trial court proceeded to trial in the face of jurisdictional objections. (Pretrial appeal Ninth Circuit No. 79-1805.) Originally, the pretrial appeals of Roy and Rowena Garner were consolidated for argument. Just prior to the date for oral argument, the Court of Appeals issued an order consolidating her pretrial appeal with her direct appeal (Ninth Circuit No. 80-1147). (See Appendix "D" - appendix p. 22.) As of January 1, 1981, neither of these appeals have been scheduled for oral argument.

§ 1291, the court further holding that "these claims may be asserted if the appellant is subsequently convicted" (appendix p. 19).

In the proceedings brought challenging the indictment for grand jury irregularities, petitioner contended that a sufficient number of grand jurors had not heard the evidence upon which the indictment had been brought and requested production of the records of the number of jurors concurring in the finding of the indictment required to be kept pursuant to Rule 6(c), Federal Rules of Criminal Procedure. The District Court made an order requiring the disclosure of dates on which the grand jury considered the case below. The records which were produced by the government showed that at least two different grand juries subpoenaed witnesses in conjunction with the case, on several dates between January, 1975 and April 26, 1979 (the date the indictment was returned). Also produced was a transcript of the April 26, 1979 grand jury proceeding and internal evidence from that transcript indicated that the new grand jurors had been supplied transcripts of prior proceedings but had not examined the contents of these transcripts. Thus, a prima facie showing was made that a majority of grand jurors voting to return the indictment did not hear any evidence in support of the indictment. What was *not* made available, and which the trial court declined to order, was a "record of the number of jurors concurring in the finding of . . . [the] . . . indictment." [3]

[3] In 1971, the Ninth Circuit, in United States v. Alter, 482 F.2d 1016, 1029, n. 21, had held that " . . . the proceedings before the grand jury are secret, but the ground rules by which the grand jury conducts those proceedings are not."

Since the Court of Appeals declined to hear the appeal on the ground of grand jury irregularities, the sub-issues presented to them, that is to say, the error of the trial court in failing to order proper discovery, and failing to hold a hearing, and erroneously denying the motion to quash the indictment based upon the evidence which *was* produced, was never passed upon.

ARGUMENT

This Court, in *Abney v. United States,* 431 U.S. 651 (1977), held that a pretrial order rejecting a claim of former jeopardy was a "final decision" satisfying the jurisdictional prerequisite of 28 U.S.C. § 1291.

Again in *Helstoski v. Meanor,* 442 U.S. 500, 506 (1979), this Court, in holding that former Congressman Helstoski had a pretrial appeal rather than a mandamus remedy, noted the reasons that such a pretrial appeal was available and quoted the language of *Abney* as "particularly apt, even though the context was the Double Jeopardy Clause":

> "There can be no doubt that such orders constitute a complete, formal and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." (*Abney* at 659.)

In the instant case, if the requisite number of grand jurors did not hear any evidence, then there was a failure

of compliance with the Fifth Amendment mandate that a federal prosecution of this nature be brought by a grand jury indictment or presentment. It is as if no indictment had been brought at all.

The characterization of the purpose of the Double Jeopardy Clause (in *Abney*) "echoed this Court's statement in *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967), that the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves' . . . . " (*Helstoski* at 508.)

There is no perceivable difference between bringing an indictment in violation of the "Double Jeopardy" Clause, the "Speech and Debate" Clause, or the "Indictment" Clause itself. The Court of Appeals erred in holding that the trial court's order was not a "final decision." To paraphrase this Court: "By analogy, if a defendant 'is to avoid exposure to [the criminal law process], and thereby enjoy the full protection of the ["Indictment"] Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs." (*Helstoski, supra,* at 509, paraphrasing *Abney, supra,* at 662.)

CONCLUSION

Certiorari should be granted and the matter remanded to the court with directions to set aside its orders dismissing the appeal and to consider the appeal of petitioner on its merits.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

INDEX TO APPENDIXES

		Page
"A"	Opinion of the Court of Appeals for the Ninth Circuit filed October 6, 1980	1
"B"	Denial of Petition for Rehearing and Suggestion for Rehearing En Banc filed November 19, 1980	20
"C"	Minute Order granting stay of mandate until January 19, 1981	21
"D"	Order consolidating pretrial appeal (No. 79-1805) of ROWENA GARNER with her direct appeal after conviction (No. 80-1147)	22

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROY DALTON GARNER, Defendant-Appellant.

NO. 79-1802.

D. C. NO. CR-R–79-17-ECR.

[FILED OCTOBER 6, 1980]

Appeal from the United States District Court
District of Nevada
Edward C. Reed, Jr., District Judge Presiding
Argued and Submitted August 11, 1980

Before: KILKENNY and FARRIS, Circuit Judges, and BELLONI, District Judge.*

KILKENNY, Circuit Judge:

Appellant appeals from an order denying his motion to dismiss a seven count federal grand jury indictment charging him with: (1) violations of 18 U.S.C. § 1343 [fraud by wire]; (2) violations of 18 U.S.C. § 1952(a)(3) [interstate travel in aid of racketeering enterprise and use of interstate facility in the aid of a racketeering enterprise].

Appellant filed motions to dismiss the indictment on

---

*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

three grounds: (a) the indictment violated Garner's right to be free from double jeopardy; (b) the indictment violated the Department of Justice's policy recognized in *Petite v. United States,* 361 U.S. 529 (1960); and (c) there were irregularities in the grand jury proceedings.

Briefly summarized the issues as outlined in the various counts of the indictment are: (1) Count I charges appellant and his accomplices with implementing a marked card system to defraud Harrah's Casino of substantial sums of money, of transporting that money across state lines, and using the telephone to make a call between Reno, Nevada, and Oxnard, California, in aid of the scheme, all in violation of the provisions of 18 U.S.C. §§ 1342 and 1343; (2) Counts II, IV and VI charge appellant and his accomplices with traveling and causing travel in interstate commerce on three occasions to carry on a business activity unlawful under Nevada law and in violation of 18 U.S.C. § 1952(a)(2) and (3); (3) Counts III and V charge appellant with using the telephone to make interstate calls in aid of racketeering in violation of §§ 1952(a)(2) and (3), and Count VII charges that one of appellant's accomplices transported stolen money in interstate commerce in violation of 18 U.S.C. § 2314.

ISSUES

(1) Were the denials of the pretrial motions appealable orders?

(2) Should the indictment be dismissed on double jeopardy grounds?

(3) Whether the policy announced in *Petite v. United States, supra,* requires a dismissal of the indictment.

(4) Whether the district court erred in not ordering disclosure of certain grand jury materials.

DOUBLE JEOPARDY CLAIM

Inasmuch as appellant has not been tried, our initial question is whether the denials of his retrial motions are appealable orders. Generally speaking, such denials are not final judgments which are appealable. *United States v. Griffin*, 617 F.2d 1342 (CA9 1980). However, when a claim of double jeopardy is made in a pretrial motion to dismiss, the denial thereof is appealable. *Abney v. United States*, 431 U.S. 651 (1977); *United States v. Solano*, 605 F.2d 1141 (CA9 1979). Consequently, we are in a position to respond to appellant's double jeopardy claim. The claim, in our opinion, is without merit.

To support this claim, the appellant relies on an earlier trial and conviction in violation of 18 U.S.C. § 1343 [wire fraud]. He had used what is known to the trade as a "blue box" to enable him to place undetected long distance telephone calls which defrauded the Nevada Bell Telephone Company. Appellant argues that because his use of the telephone on two occasions in aid of the scheme to defraud Harrah's, which is the basis of Counts III and V of the indictment, also served to support his earlier "blue box" conviction, his constitutional right not to be subject to double jeopardy was violated. We disagree. His earlier conviction was for defrauding the telephone company. Here he is charged with an entirely different offense, using the telephone in aid of the racketeering scheme. Although both offenses undeniably involved common facts—the use of the

telephone—the appellant has not thereby established that the rights conferred upon him by the double jeopardy clause have been violated.

In *Blockburger v. United States,* 284 U.S. 299, 304 (1932), the Supreme Court stated that "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Surely this does not mean that whenever there exist any common facts between the facts supporting an earlier conviction and those which form the basis for a subsequent prosecution the second prosecution is barred by the double jeopardy clause. See also, *United States v. Rone,* 598 F.2d 564 (CA9 1979).

Under Counts III and V, brought under § 1952(a)(3), the government must prove the use of the telephone with the intent to aid an unlawful activity. The unlawful activity involved herein is a business enterprise involving gambling —*i.e.*, the scheme to defraud Harrah's Casino. Under § 1952 (a)(3) the government must clearly prove facts that were unnecessary to support the earlier conviction. Under the earlier § 1343 charge the government was required to prove the use of the telephone to aid a scheme to defraud the telephone company. The use of the telephone for that purpose was not necessary to sustain the § 1952(a)(3) conviction. We conclude that there is no merit to appellant's double jeopardy claim.

JUSTICE DEPARTMENT POLICY

Appellant argues that he is entitled to the protection of the Justice Department's policy recognized in *Petite.* In *Petite,* the Supreme Court, at the request of The Solicitor General, remanded a case to the district court with instructions to dismiss the indictment on the ground that it was the policy of the Justice Department not to prosecute a federal case where there has been a state prosecution for substantially the same act or acts unless, for compelling federal interest, The Attorney General recommends prosecution. In the instant case, appellant had been indicted in a Nevada state court for card cheating in violation of a Nevada statute. This indictment was later dismissed. Appellant argues that *Petite* requires the dismissal of the present prosecution.

Appellant's argument must be rejected. We have said that "Such arguments are not properly the subject of an *Abney* appeal. Even if the issue were before us, this court has held that a violation of the *Petite* policy does not compel the dismissal of a federal prosecution." *United States v. Solano,* 605 F.2d 1141, 1143 (CA9 1979).

ALLEGED GRAND JURY IRREGULARITIES

In his motion to dismiss the indictment on account of the grand jury irregularities, the appellant requested an order: (1) compelling disclosure of the sessions of the grand jury held to consider evidence leading to the indictment returned on April 26, 1979; (2) disclosure of the attendance of the grand jurors at each of the sessions; (3) upon such dis-

closure to dismiss the indictment upon the ground that it was returned by grand jurors who did not hear, evaluate, or deliberate upon the evidence presented to the grand jury; and (4) upon the further ground that the purpose of the grand jury as envisioned by the Fifth Amendment was defeated by the procedures utilized by the government in obtaining the indictment.

Appellant specifically complains that the jurors who indicted him did not hear the evidence. He claims that one grand jury heard the evidence and did not return a true bill and that there are indications in disclosures made by the government that a major portion of the testimony heard by the indicting grand jury was simply a recapitulation of the case presented to the first grand jury. Additionally, appellant asserts that the summary was submitted by a law enforcement agent who had inherited the case upon the retirement of another agent.

As a threshold matter we must consider whether the order denying appellant's motion to dismiss the indictment because of grand jury irregularities is appealable. Our jurisdiction is wholly statutory and so we must determine whether the order falls within the terms of the applicable statute—in this case 28 U.S.C. § 1291.

Section 1291 provides that "The courts of appeals shall have jurisdiction from all final decisions of the district courts of the United States,". A final decision has long been regarded as a predicate to federal appellate jurisdiction. The finality requirement reflects the congressional policy to avoid the threats to efficient judicial administration incident to interlocutory or "piecemeal" appeals. And "[a]dherence to this rule of finality has been particularly

stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the efficient and fair administration of the criminal law.' *Dibella, supra,* at 126." *Abney v. United States,* 431 U.S. 651, 657 (1977).

The ease with which the finality rule is stated, however, belies the difficulty of its application. The Supreme Court has noted that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170 (1974). Indeed, the Court's efforts to give the rule a "practical rather than a technical construction", *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949), have on occasion led to some rather curious results. See *e.g., Gillespie v. United States Steel Corp.,* 379 U.S. 148 (1964).

Generally § 1291 requires that an order, to be appealable, must terminate the proceedings in the district court. Certain orders, however, which do not constitute final judgments fall within the "collateral order" exception articulated in *Cohen* and are, therefore, "final decisions" within § 1291.

Cohen was a stockholder's derivative action brought in a federal district court in New Jersey. Federal jurisdiction was premised upon diversity of citizenship. The defendant made a motion to require the plaintiff to post security for reasonable expenses incurred by the defense as was required by a newly enacted New Jersey statute. The district court determined that the state statute did not apply in the federal action and denied the motion. The court

of appeals reversed and ordered the posting of security. The Supreme Court concluded that the court of appeals had properly assumed jurisdiction and affirmed on the merits.

Mr. Justice Jackson based the determination of appealability on several factors. First, the district court's order was a final disposition of the particular issue involved. It was not "tentative, informal or incomplete," in any sense. 337 U.S. at 546. Second, the issue was not simply a "step toward final disposition of the merits of the case." *Id.* And finally, review after final judgment would be ineffective because at that point the "rights conferred by the statute, if it [was] applicable, [would] have been lost, probably irreparably." *Id.* The statute was intended to prevent "strike suits" by requiring security for payment of reasonable expenses if the action was adjudged to be unsustainable. The protection this statute afforded would have been lost if the defendant was required to proceed to trial without such assurances. Finally, the Court noted that the issue involved was a "serious and unsettled question." *Id.* at 547.

The Court concluded that "[t]his decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

More recently, in *Abney v. United States,* 431 U.S. 651 (1977), the Court considered whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds satisfied the *Cohen* requirements. The Court, per Mr. Chief Justice Burger, concluded that such an order was

indeed a "collateral order" within the "small class of cases" that are exceptions to the final judgment rule. First, an order denying a motion to dismiss on double jeopardy grounds is a complete and final rejection, in the trial court, of a defendant's double jeopardy claim. Second, a double jeopardy claim "is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e,* whether or not the accused is guilty of the offense charged." *Id.* at 659. Finally, the Court stated that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.* at 660. The double jeopardy clause is, in part, a guarantee against being put to trial twice for the same offense and this would be lost if a criminal defendant was forced to endure trial prior to appellate review.

The substantive double jeopardy claim presented in *Abney,* unlike the issue involved in *Cohen,* was not a serious and unsettled question.[1] The Court determined, however, that "the special considerations permeating", *id.*

---

[1] Some courts have emphasized the requirement that the issue involved be a serious and unsettled question. In Weight Watchers v. Weight Watchers International, Inc., 455 F.2d 770, 773 (CA2 1972), the Second Circuit said that "[a]nother important factor bearing on the application of the Cohen doctrine, . . . , is whether a decision will settle a point once and for all, as it did in the Cohen case, or will open the way for a flood of appeals concerning the propriety of a district court's ruling on the facts of a particular suit." The Second Circuit has recently debated the question of whether Cohen requires that a "collateral order" involve a serious and unsettled question. Compare Armonstrong v. McAlpin, No. 79-7042, Sl. Op. at 3706-8 and n. 11 (CA2, June 20, 1980) with Sl. Op. at 3732-4 (Mulligan, J., concurring in part and dissenting in part).

at 663, double jeopardy claims justified including another class of cases within the "small class of cases" that satisfy the "collateral order" exception. The Court acknowledged that "our holding may encourage some defendants to engage in dilatory appeals . . . . However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy." *Id.* at 662 n. 8.[2]

Perhaps not surprisingly, the short period since the Supreme Court's decision in *Abney* has been marked by an increasingly large number of claims that various pretrial orders are immediately appealable as "collateral orders." The Supreme Court, in *United States v. MacDonald,* 435 U.S. 850 (1978) rejected an assertion that a pretrial order denying a defendant's motion to dismiss an indictment because of an alleged violation of his Sixth Amendment right to a speedy trial was a "final decision." After reemphasizing the importance of finality to judicial administration, especially in the criminal context, the Court proceeded to apply the criteria enunciated in *Cohen* and *Abney.*

First, the Court noted that the denial of a motion to dismiss on speedy trial grounds does not represent a complete and final rejection, in the trial court, of the defendant's

---

[2]It should be noted that the Abney court expressly precluded the possibility of a court of appeals exercising pendent appellate jurisdiction. Each claim in a motion to dismiss must be treated separately. A claim is not appealable because brought in conjunction with a double jeopardy claim. Each claim, in order to be immediately appealable, must independently satisfy the "collateral order" exception.

claim. "The resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case. As is reflected in the decisions of this Court, most speedy trial claims, therefore, are best considered after the relevant facts have been developed at trial." *Id.* at 858. A defendant would have the opportunity to make a similar motion after trial—when prejudice could be better evaluated.

Second, the rejection of a speedy trial claim is not "collateral" to the principal issue at trial. The determination of a speedy trial claim is not independent of the outcome at trial—particularly since the question of prejudice to the defense is central to an analysis of a speedy trial claim.

Third, the right involved in *MacDonald* was unlike the rights asserted in *Cohen* and *Abney* in that its "legal and practical value . . . would [not] be destroyed if it were not vindicated before trial." *Id.* at 860. The Court recognized that there was a "superficial attraction" to the contention that the right to a speedy trial involved a right not to be subject to a nonspeedy trial. However, "[u]nlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial." *Id.* at 861.

The Court asserted that the application of the *Cohen* and *Abney* analysis resolved the appealability issue. It then mentioned several policy considerations which "reinforced" its conclusion. Among these considerations was the

fact that because there would inevitably be some delay between indictment and trial every defendant could make a pretrial motion for dismissal on speedy trial grounds, the denial of which would be immediately appealable. Unlike a double jeopardy claim, which requires at least a colorable showing of former jeopardy "there is nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim." *Id.* at 862. The Court concluded its analysis by saying that "we decline to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review." *Id.* at 863.

In *Helstoski v. Meanor,* 442 U.S. 500 (1979), the Court again considered the scope of the "collateral order" exception, this time in the context of the speech or debate clause. Helstoski, a United States Congressman from New Jersey, had moved to dismiss an indictment on the ground that the indictment violated the speech or debate clause. This motion was denied. Helstoski petitioned the Third Circuit for a writ of mandamus directing the district court to dismiss the indictment. The court declined to issue the writ, holding that the indictment did not violate the speech or debate clause. The Supreme Court determined that mandamus was not the appropriate remedy because review had been available by direct appeal.

The Court found that the district court order rejecting the speech or debate clause claim was a "collateral order." The denial of the motion to dismiss was a final disposition, in the trial court, of that particular claim.

Second, the speech or debate clause contention was wholly collateral to the merits of the charge against Helstoski. And because "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.' ", *Id.* at 508, this right would be lost if Helstoski was exposed to prosecution prior to appellate review.

This court has recently held that the denial of a motion to dismiss an indictment on grounds of vindictive prosecution is an appealable order. *United States v. Griffin,* 617 F.2d 1342 (CA9 1980). *Griffin* involved a straightforward application of the *Cohen* criteria. Most importantly, we found that "a vindictive prosecution claim, like the *Abney* double jeopardy claim, involves a right to be free from prosecution itself, rather than merely the right to be free from a subsequent conviction. Thus, the vindictive prosecution doctrine is a limit on prosecutorial discretion, and goes to the very authority of the prosecution to hale the defendant into court in the first place." *Id.* at 1345-6.

In *In re Fendler,* 597 F.2d 1314 (CA9 1979), we considered whether an order denying a petition to conduct a *voir dire* of the grand jurors investigating appellant concerning their possible bias, prejudice or economic interest was appealable. We concluded that such an order was not appealable. In *Fendler* an indictment had yet to be returned and the instant case might appear to be distinguishable on that ground. However, the court indicated that such facts would not be a controlling factor on the question of appealability. We said "[t]here is no reason to depart from the policy against piecemeal appeals in this case. If and when an indictment is returned against appellant, he can raise his

claims in a motion to dismiss the indictment, 28 U.S.C. § 1867 (e) and Fed.R.Crim.P. 6 (b) (2); *and since the denial of such a motion is reviewable on direct appeal from a criminal conviction, denial of review now will not render review impossible.*" *Id.* at 1315 [Emphasis added]. Although this statement is not binding in this instance we believe that it cautions against an overbroad reading of *Cohen* and *Abney*.

In the instant case appellant contends that the order denying his motion to dismiss the indictment because of grand jury irregularities is appealable. Since the order is not "final" as that term is ordinarily construed appellant maintains that it is within the "small class of cases" that qualifies as a "collateral order." We note at the outset that the particular issue here in question is not appealable simply because brought together with the admittedly appealable double jeopardy claim. In light of *Abney's* rejection of the concept of pendent appellate jurisdiction we refuse to follow appellant's suggestion that we resolve all the issues presently before us simply because of the existence of the double jeopardy claim.

Appellant claims that the order herein involved satisfies the principles the Supreme Court articulated in *Cohen* and *Abney*. The district court's order was a complete and final determination of appellant's claim. And the issue involved is collateral to, and separate from, the principal issue at trial, *i.e.*, the guilt or innocence of the appellant. The question remains, however, whether the particular right involved would be "lost, probably irreparably" if immediate appellate review is not available.

The Fifth Amendment provides, in part, that "No

person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," U. S. Const. amend. V. The Supreme Court has said that "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States,* 361 U.S. 212, 218 (1960).

> " '[T]he institution [grand jury] was adopted in this country, and is continued from considerations similar to those which give it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.' "

Ex parte Bain, 121 U.S. 1, 11 (1886).

The right to an indictment by a grand jury is, therefore, intended to insure that one is not "held to answer" for an infamous crime unless an independent body standing between the prosecutor and the accused has determined that

the accused should be required to do so. Here, appellant was indicted by a grand jury and so we are not required to address the appealability of an order denying a motion to dismiss on the grounds that an indictment allegedly required by the Fifth Amendment was wholly absent.

Appellant argues that because of alleged irregularities the purposes of the grand jury were not served. Appellant maintains that he has a right not to be prosecuted, not to be "held to answer," unless the grand jury proceedings were properly conducted. Otherwise, the grand jury will not have served its intended purpose of standing as a buffer between the accuser and the accused. Appellant is not asserting a right to be free from subsequent conviction because even if there was a dismissal there could be a reindictment. Appellant is asserting a right to be free from this prosecution because of the alleged grand jury irregularities. He asserts that later review would be meaningless because at that point he will have been forced to endure trial without the assurance that the grand jury had effectively served its intended purpose. The right not to stand trial unless indicted by a properly functioning grand jury will have been irreparably lost.

We admit the argument appellant advances has a "superficial attractiveness." We hold, however, that the order denying the motion to dismiss the indictment because of grand jury irregularities is not immediately appealable. Our conclusion is premised primarily upon pragmatic considerations. The "collateral order" exception should be narrowly construed so that the exception does not swallow the finality rule. Although one may dispute the wisdom of the finality rule Congress

had determined that, in most instances, a "final decision" is a predicate to the exercise of federal appellate jurisdiction. We are convinced that, especially in the criminal context, the policy against piecemeal appellate adjudication is sound and that the exceptions to the rule should be few. To allow an interlocutory appeal in this instance would create nothing short of chaos in the criminal justice system. We decline appellant's invitation to include this class of case within the "small class of cases" that satisfy the "collateral order" exception.

To hold the order here in question appealable would open the possibility for a pretrial appeal in nearly every criminal case. A claim like the one appellant is making—that the evidence before the grand jury was not adequate and competent, *i.e.*, that it was hearsay evidence—would be available in nearly every instance.

In *Costello v. United States,* 350 U.S. 359, 363-4 (1956), the Court rejected such claims and there said:

> "[p]etitioner urges that this Court should exercise its powers to supervise the administration of justice in the federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a

> trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

Recently the Third Circuit in *In re Grand Jury Proceedings (Johanson),* No. 80-1418 (CA3 August 21, 1980), rejected a contention that the denial of a motion for an evidentiary hearing to learn who had divulged information to the news media in order to have them disqualified from participating in grand jury proceedings was an appealable order. The court said that "flawed grand jury proceedings can be effectively reviewed by this court after a conviction has been entered and all criminal proceedings have been terminated in the district court. [Citing *Costello*] . . . Because delayed appellate review will not irreparably deny Johanson his right to an impartial grand jury, (his conviction could be reversed if at a later stage we conclude the grand jury was tainted) the order is not reviewable immediately as a collateral order." *Id.* sl. op. at 9 - 10.

Mr. Justice Blackmun's observations in *MacDonald, supra,* are equally applicable here. Like a speedy trial claim, and unlike a double jeopardy claim, there is nothing about the circumstances of the type of claim involved herein that would inherently limit its availability. In every criminal prosecution a defendant could make a motion to dismiss because of the type of evidence presented to the grand jury, and, under the rationale espoused by appellant, its denial would be immediately appealable. To allow an immediate appeal under these circumstances would bring about a dis-

ruption of the efficiency of the criminal justice system that we are unwilling to countenance.

CONCLUSION

The order of the district court denying the motion to dismiss on double jeopardy grounds is AFFIRMED. The order of the district court denying the motion to dismiss on the *Petite* policy ground and on the basis of the alleged grand jury irregularities is not appealable. These claims may be asserted if the appellant is subsequently convicted. Accordingly, the appeal on the latter two issues is dismissed.

IT IS SO ORDERED.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROY DALTON GARNER, Defendant-Appellant.

No. 79-1802.

DC No. CR 79-17-1 (ECR) Reno, Nevada

[FILED NOVEMBER 19, 1980]

Before: KILKENNY, FARRIS, Circuit Judges and BELLONI,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

MINUTE ORDER STAYING MANDATE

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROY DALTON GARNER, Defendant-Appellant.

CA NO. 79-1802.

DC NO. Cr79-17-1 ECR NEVADA (Reno)

[FILED DECEMBER 17, 1980]

Before: KILKENNY, FARIS, Circuit Judges and BELLONI,* U. S. District Judge

Appellant's Application for Stay of Mandate Pending Filing of a Petition for Writ of Certiorari is granted. The mandate is stayed to and including January 19, 1981.

FOR THE COURT
Richard H. Deane,
Clerk of Court

by Ms. J. V. Ross, Deputy

*The Honorable Robert C. Belloni, United States District Judge from the District of Oregon, sitting by designation.

ORDER CONSOLIDATING PRETRIAL APPEAL (No. 79-1805) OF ROWENA GARNER WITH HER DIRECT APPEAL AFTER CONVICTION (No. 80-1147)

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROWENA GARNER, Defendant-Appellant.

No. 79-1805

[FILED JULY 30, 1980]

Appeal from the United States District Court
District of Nevada

Before: KILKENNY and FARRIS, Circuit Judges, and BELLONI, District Judge.*

Rowena Garner's appeal No. 79-1805 from the denial of her pretrial motion to dismiss the indictment against her, calendared for the August 11, 1980, session of this court in San Francisco, is stricken from that calendar and ordered consolidated with her direct appeal from her conviction in *United States of America v. Rowena Garner,* Appeal No. 80-1147.

KILKENNY
Circuit Judge

---

*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JANUARY , 1981, I served the within PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT (United States v. Garner) on the following named parties by depositing three copies thereof, each, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the address as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEVADA
300 Las Vegas Blvd. South
Federal Building
Las Vegas, Nevada 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY , 1981 at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 COPIES to UNITED STATES SUPREME COURT, WASHINGTON, D.C.
with $200 docket fee annexed to copy marked Original

Dean-Standefer, 326½ Main St., Huntington Beach, Ca.
(714) 536-7161